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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 367

RUSSELL LOUIS LAROSE,
Petitioner,

vs.

LIEUTENANT GENERAL W. G. WYMAN, or any other Commanding Officer of the Sixth Army, Presidio, San Francisco, California,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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Subject Index

		Page
1.	Opinions below	2
2.	Statutory provision sustaining jurisdiction	2
3.	Questions presented	3
4.	Statutes and regulations involved	6
5.	Statement of the case	6
6.	Reasons for granting the writ	11
Conclusion		15

Table of Authorities Cited

Cases	Pages
Blevens v. United States, 217 F. 2d 506	14
Chih Chung Tung v. United States, 142 F. 2d 919	12
Collins v. Miller, 252 U.S. 364	15
Cox v. Wedemeyer, 192 Fed. 2d 920	11
Gonzales v. United States, 348 U.S. 407	14
Jewell v. United States, 208 F. 2d 770	14
Simmons v. United States, 348 U.S. 397	14
Sterrett v. United States, 216 F. 2d 659	14
Talcott v. Reed, 217 F. 2d 360	13
United States ex rel. Bauer v. Shaughnessy, 178 F. 2d 756	15
United States ex rel. Berman v. Craig, 207 Fed. 2d 888	11
United States v. Hagaman, 213 F. 2d 86	14
United States v. Nelson, 221 F. 2d 623	14
United States v. Stiles, 169 F. 2d 455	13

Constitutions	
United States Constitution, Fifth Amendment	4

Statutes	
32 C.F.R. Section 1622.11	6
32 C.F.R. Section 1622.14	6
32 C.F.R. Section 1622.25(a)	6
32 C.F.R. Section 1622.25(b)(8)	6
32 C.F.R. Section 1624	13
32 C.F.R. Section 1624.1(a)	6
32 C.F.R. Section 1625.2	6, 11
32 C.F.R. Section 1626.2	12
32 C.F.R. Section 1626.2(a)	6
32 C.F.R. Section 1626.2(c)(1)	6
32 C.F.R. Section 1626.2(d)	6
32 C.F.R. Section 1626.11	13, 16

	Pages
32 C.F.R. Section 1626.11(a)	6
32 C.F.R. Section 1626.13	6, 9, 12
32 C.F.R. Section 1626.14	6, 9
32 C.F.R. Section 1626.25(a)(4)	6
32 C.F.R. Section 1626.41	6, 13
18 U.S.C., Section 2241	3
28 U.S.C. (Section 1254(1), Judicial Code)	3
28 U.S.C., Section 2253	6, 15
50 U.S.C. App. (Supp. V), Section 451(c) (Universal Military Training and Service Act, Section 1(c)	6
50 U.S.C. App. (Supp. V), Section 456(j), 65 Stat. 75, 83, and 86 (Universal Military Training and Service Act, Section 6(j)	6

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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Russell Louis LaRose, prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review a judg-

ment of that Court entered on June 16, 1954, reversing the orders of the United States District Court for the Northern District of California, Southern Division, granting a petition for a writ of habeas corpus and ordering the petitioner discharged and released from the custody of the United States Army, said orders being entered on June 18, 1954, June 23, 1954, and June 24, 1954.

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1. OPINIONS BELOW.

The opinion of the District Court for the Northern District of California, Southern Division, granting the petition for writ of habeas corpus is unreported, but is set forth in the record, pages 9-10. It is also printed as Appendix A to this petition. The opinion of the Court of Appeals for the Ninth Circuit (R. 95-102)* is as yet unreported. It is printed as Appendix B to this petition.

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2. STATUTORY PROVISION SUSTAINING JURISDICTION.

The judgment of the Court of Appeals was entered on June 16, 1955 [R. 103; see also Appendix C to this petition].

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*All references to the Transcript of Record are designated by pages of it as follows: [R. 3]. A photocopy of the entire Selective Service File of petitioner was entered in evidence as Petitioner's Exhibit No. 1. The file is not part of the Transcript of Record but is before the Court. All references to the file are designated as pages of Exhibit 1 as follows: [Ex. 3]; the pagination of Exhibit 1 is by a one-quarter inch high pencilled number, ordinarily found at the top of each sheet of the Exhibit.

The final judgment of the Court of Appeals (denial of the seasonably filed petition for rehearing) was entered on July 25, 1955 [R. 105; see also Appendix D to this petition].

The petition for writ of certiorari is filed within the required 90 days' time for civil matters. The jurisdiction of this Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The district Court has jurisdiction under 18 U.S.C. §2241.

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3. QUESTIONS PRESENTED.

I.

The record shows that the local board after classifying the petitioner as an I-A-O the first time, received a letter from him stating, "I request *an appeal* of my classification. * * * If you recall my conscientious objector application, this is not the classification I desire, and not the classification I will be satisfied with" [Ex. 66, also R. 21-22].

The local board never transferred his file to the appeal board, as required by the regulations, but, instead, some six months later notified petitioner he had been reclassified as a student (II-S).

The question presented is whether the local board, after having received a notice of appeal, can deprive petitioner of his appeal by failing to forward the file to the appeal board. Also presented is whether a local board has the power or jurisdiction to reclassify a

registrant after an appeal has been taken from its decision.

II.

The record shows that after being classified as an I-A-O a second time by the local board, the petitioner within the time for appeal, went to that board in order to appeal his classification and was informed that it "wouldn't do any good to appeal" [R. 61-63]. Petitioner returned several times to the local board within the week following this classification and was told by the clerk of the board that if he didn't stop coming so often, he would be immediately drafted.

The record also shows that petitioner still within the time for appeal, talked with the Deputy State Selective Service Director and was informed that "an appeal would be absolutely useless". Petitioner did not file a written notice of appeal.

The question presented is whether the petitioner has been denied an appeal by reason of the fraud and misrepresentation of Selective Service officials. Also presented is whether the petitioner actually did take an appeal from his second classification as an I-A-O.

III.

Whether petitioner's actions in contacting his local board, after both classifications as I-A-O, were requests for personal appearances before the local board, which requests were not granted, thus depriving petitioner of procedural due process under the Act and the Regulations and the Fifth Amendment to the United States Constitution.

IV.

The record shows that petitioner consistently claimed that he should be classified as an I-O, a conscientious objector professing objections to all military training and service, both combatant and noncombatant. The local board never granted him an appeal and his case was never referred to the Department of Justice for an advisory recommendation.

The question presented is whether the local board by reason of its refusal to recognize petitioner's appeal from both classifications of I-A-O, has deprived him of a hearing conducted by a Hearing Officer of the Department of Justice, a copy of the recommendations of the Department of Justice, full, fair, and adequate summary of any adverse information in an F.B.I. report and an opportunity to rebut and reply to any adverse recommendation.

V.

The record does not disclose any evidence as to why the local board classified petitioner as an I-A-O rather than as an I-O as he requested. The petitioner never had a personal appearance before the local board.

The question presented was whether the classification as an I-A-O was arbitrary and without basis in fact.

VI.

The record shows that the government only appealed from the order of June 18, 1954, granting the

petition for a writ of habeas corpus and not from the subsequent orders made on June 23 and June 24, 1954, releasing and discharging the petitioner from the custody of the U. S. Army.

The question presented is did the Court of Appeals have any jurisdiction over the purported appeal, where no appeal was taken from the final order of the District Court.

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4. STATUTES AND REGULATIONS INVOLVED.

Section 1(c) of the Universal Military Training and Service Act [50 U.S.C. App. (Supp. V), Section 451(c)] is involved. Also, Section 6(j) of the Act must be considered [50 U.S.C. App. (Supp. V), Section 456(j), 65 Stat. 75, 83, and 86]. See also 28 U.S.C., Section 2253. Also involved are the Selective Service Regulations Sections 1622.11, 1622.14, 1622.25 (a) and (b)(8), 1624.1(a), 1625.2, 1626.2(a) and (c) (1) and (d), 1626.11(a), 1626.13, 1626.14, 1626.25 (a) (4), 1626.41 (32 C.F.R.). All are printed in Appendix E.

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5. STATEMENT OF THE CASE.

At the time the petition for a writ of habeas corpus was filed, April 21, 1954, the petitioner was a member of the United States Army, having been inducted on February 13, 1953, as an I-A-O (conscientious objector not opposed to noncombatant training and service). The petitioner repeatedly protested

this classification and his induction and consistently contended he was entitled to a classification as a conscientious objector opposed to all participation in military activities; an I-O.

His initial claim was made in his Classification Questionnaire (Ex. 8) which was on or about November 13, 1951.

The Questionnaire also revealed that petitioner was then a fulltime student at Deep Springs College (Ex. 2) but petitioner made no claim for a student deferment by filing the necessary supporting evidence.

The petitioner filed a conscientious objector form on or about November 21, 1951, in which he again reiterated his position that he was conscientiously opposed to participation in war in any form (Ex. 10-13). He was classified by the local board as an I-A-O on January 22, 1952 (Ex. 1).

On February 1, 1952, petitioner wrote the following letter to his local board:

> "I request an appeal of my classification. I received my notice of classification two days ago. It stated that I had been classified 1-A-O. If you recall my Conscientious Objector applications, this is not the classification I desire, and not the classification I will be satisfied with.
>
> "If you considered my C.O. application at its word, I do not see how this classification resulted. My objections are as sincere as possible, as those whom I recommended will, or have, testified.

"My views do not stem from a church or religious sect. I am a member of the Lutheran Church back home and this church is not registered as being opposed to going to war as we are. But I am a Christian. And if a Christian reads the life of Christ and accepts the fifth commandment, unqualified, he cannot help but refuse to kill for any reason whatsoever, self-defense or not.

"I have read the history of our nation, and find it a truly great history. And when I read what is was that inspired our nation's founders, 'the unalienable right to life'—iterated and reiterated throughout the growth of our national spirit, I too accept this freedom which has been held so close. Unalienable—that's what I consider the right to life, and whether North Korean soldier, kidnapper, rapist, murderer, or what, I believe their life, the most priceless, greatest possession one, all, can have, should not be taken away.

"And with this view how can I fill a noncombatant position? What is the ethical difference between pulling a trigger to release a bullet or sending an order to buy one, between releasing another to fight or fighting yourself? I see none.

"Please carefully reconsider your classification. I can ask of you nothing more."

The local board did not give him an appeal, nor prepare his file for transmittal to the appeal board (see 32 C.F.R. §§ 1626.13 and 1626.14).

The petitioner did not apply for a II-S (student) classification. He had, however, written a letter on

January 26, 1952 to his board, after being ordered to report for a physical examination in which he reiterated his conscientious objections to war, but in closing stated, "I would also like to know how, I, as a student, stand with your board disregarding my conscientious objections" (Ex. 63).

On July 23, 1952, some six months later he was notified he was classified as a student (Ex. 1). This classification was based on information supplied to the local board by officials of Deep Springs College, California, to the effect that petitioner was a full time student at that college (Ex. 53, 61).

The local board had been aware that petitioner was a student at the time it made its original classification of I-A-O by reason of his Classification Questionnaire (Ex. 2-9).

After receiving his II-S classification as a student, he visited the draft board "almost weekly" indicating he wasn't satisfied with the student's classification and wanted to receive the conscientious objector's classification (R. 59).

On September 13, 1952 the local board was advised by the Director of Deep Springs College that petitioner was no longer enrolled at the college (Ex. 45). On September 23, 1952 the local board changed his classification to I-A-O. Within two days thereafter, and for a period of days, petitioner went in person to his local board to protest his classification and was told that it wouldn't do him "any good to appeal it" and that if he didn't stop coming to the

local board and bothering the staff that they would draft him right away (R. 60-62). He was told he could go to see the State Selective Service Director and he attempted to do so, still within a week of his classification. He talked with the Deputy State Selective Service Director. He was told that "an appeal would be useless; they had just voted on it and had reached a conclusion" that he was an I-A-O, and that there was nothing petitioner could do about it but be drafted (R. 62). Relying on these statements of the local board and the Deputy State Selective Service Director, he did not file a written notice of appeal, nor a request for a personal appearance.

The petitioner never had a personal appearance and his case was never referred to the Department of Justice for a hearing before a hearing officer, and he at no time ever received a copy of the recommendations and resume of information on the sincerity of his conscientious objections.

On January 12, 1953 the petitioner was ordered to report for induction on February 13, 1953. He was inducted as a conscientious objector, available for non-combatant service only. He was assigned to Fort Sill, Oklahoma, for training in the field artillery at first, but after protesting that assignment was sent to a non-combatant one. Thereafter, he left his post (R. 48) and after being apprehended was transferred to the Presidio of San Francisco. He then petitioned for a writ of habeas corpus.

6. REASONS FOR GRANTING THE WRIT.

I.

An important question presented by this petition has not yet been determined by this Court, but should be. It is whether a local board after classifying a selective service registrant as an I-A-O, may deny him an appeal, even though he files a letter stating, "I request an appeal of my classification * * * If you recall my conscientious objector classification, this is not the classification I desire, and not the classification I will be satisfied with." The letter reiterates his conscientious objections to participation to war and in the armed forces as a non-combatant and ends with "Please carefully reconsider your classification." It did not include and was not accompanied by any new material not heretofore known to the local board (32 C.F.R. § 1625.2).

The Selective Service Regulations provide and the cases have held that registrants are not to be treated as if they were engaged in formal litigation assisted by counsel. See 32 C.F.R. § 1626.11 (Appendix E), *United States ex rel. Berman v. Craig,* 207 Fed. 2d 888; *Cox v. Wedemeyer,* 192 Fed. 2d 920. An appeal need not be in any particular form and should be liberally construed in favor of the registrants. Here there was a clear request for an appeal, which was not honored. The regulations provide that a registrant is not to be inducted while an appeal is pending (32 C.F.R. § 1626.41).

The Court of Appeals rules that the petitioner's letter was not an appeal, even though the word "ap-

peal" was used, but was instead a request for reopening and reconsideration, although it was accompanied by no new material. Therefore, a serious question is raised, if the letter was, in fact, an appeal, did it not deprive the local board of the power to reopen and reclassify the petitioner, and should it not have immediately transferred his file to the appeal board? (Section 1626.13). It also would appear that the decision of the Court of Appeals for the Ninth Circuit is at variance with a similar case in the First Circuit, *Chih Chung Tung v. United States,* 142 F. 2d 919.

II.

The undisputed evidence was that the petitioner, within the time for filing an appeal, after his second classification as an I-A-O, had gone to his local board to appeal his classification and was told it "wouldn't do any good to appeal" (R. 60-62). He was also told this by the Deputy State Director of Selective Service (R. 62).

Congress intended not only to guarantee a right of appeal to registrants but also to permit appeals freely and with a minimum of procedural formality (32 C.F.R. § 1626.2, *Chih Chung Tung v. United States,* 142 F. 2d 919).

By reason of the actions of the registrant, it is quite clear that he desired to appeal, and that the personnel of his local board and Selective Service officials were as fully informed of this intention, as if he had filed a written notice of appeal.

If the procedural rights guaranteed by the Act and Regulations may be thus negated by misrepresentations of responsible officials, they will have little value to registrants. If a registrant is told that it would be useless to appeal, as here, or threatened with punitive action for bothering the board, then it would appear, that he has been deprived of his procedural rights of appeal, irrespective of his failure to meet the technical requirement of filing a written notice. This important question has not yet been decided by this Court and should be.

This question should also be considered from one other view, and that is, that the petitioner did in fact file a valid appeal, even though unwritten, in accordance with the spirit of liberality with which appeals should be granted and recognized (see 32 C.F.R. 1626.11).

If it is true that an appeal is pending, petitioner was illegally inducted (see 32 C.F.R. 1626.41).

III.

In both instances after being classified as I-A-O, the petitioner indicated to the board that he was dissatisfied and wanted to do something about the classification. In neither case did the local board consider his efforts as the filing of an appeal. However, even if they felt that his efforts were not sufficient in that regard, they should have, at least, considered them as requests for personal appearances (32 C.F.R. § 1624). See *Talcott v. Reed,* 217 F. 2d 360; *United States v. Stiles,* 169 F. 2d 455.

IV.

The petitioner by reason of the local board's refusal to recognize his appeals, has been deprived of a hearing before a Department of Justice hearing officer, a copy of that Department's recommendations, a full, fair and adequate summary of any adverse information in the F.B.I. report made in investigating his claim, and an opportunity to rebut and reply to any adverse recommendation. Such a holding is in conflict with the recent cases of *Simmons v. United States,* 348 U.S. 397; *Gonzales v. United States,* 348 U.S. 407, and deprives him of due process of law. See *Sterrett v. United States,* 216 F. 2d 659; *Blevens v. United States,* 217 F. 2d 506; *United States v. Nelson,* 221 F. 2d 623.

V.

Nothing appears in the record to indicate why the petitioner was given an I-A-O classification rather than an I-O as he requested. Therefore a substantial question is involved as to whether the classification here is arbitrary and without basis in fact. *Jewell v. United States,* 208 F. 2d 770; *United States v. Hagaman,* 213 F. 2d 86.

VI.

The record shows (R. 12) that respondent appealed from the order of the District Court "issuing a writ of habeas corpus discharging Russell Louis LaRose from the custody of respondent * * * made and entered on the *18th day of June, 1954*" (emphasis added). However, on that day, the District Court merely granted the petition for the writ, thus bringing pe-

titioner into Court (R. 9-10). It wasn't until June 23rd and June 24th, that orders were issued discharging (R. 11) and releasing (R. 11) petitioner from the custody of respondent, and no appeals were taken from those orders.

In habeas corpus proceedings, appeals may only be taken from *final* orders (28 U.S.C. § 2253). *Collins v. Miller*, 252 U.S. 364; *United States, ex rel. Bauer v. Shaughnessy*, 178 F. 2d 756.

The important question thus is raised whether the Court of Appeals ever had the jurisdiction by reason of a faulty notice of appeal to review and reverse the orders of the District Court.

CONCLUSION.

This petition should be granted for one or more of the six reasons herein stated.

Dated, San Francisco, California,
August 24, 1955.

Respectfully submitted,
WAYNE L. COLLINS,
Counsel for Petitioner.

Of Counsel:
LAWRENCE SPEISER,
Staff Counsel,
American Civil Liberties Union of Northern California.

(Appendices A, B, C, D and E Follow.)

Appendix A

In the United States District Court for the Northern District of California, Southern Division

In the Matter of: The Petition of Russell Louis LaRose, *Petitioner,* vs. Lt. Gen. W. G. Wyman, Commanding Officer of the Sixth Army, *Respondent.*	No. 33,502

ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS.

This matter having been heard, briefed and submitted for ruling,

The Court finds that petitioner submitted a letter to his draft board after it had classified him I-A-O, and that such letter constituted an appeal, thus depriving the local board of jurisdiction over petitioner; that no hearing was ever accorded petitioner on appeal, nor was any appeal granted, all of which constituted a denial of due process of law (*Knox v. United States,* 200 F. 2nd 398).

The Court further finds that even though petitioner's letter be construed as a request for reconsideration by his draft board, no hearing was ever accorded him pursuant to such request with respect to his basic classification of I-A-O (as distinguished

from a temporary deferment of II-S granted at the behest of petitioner's school head), thus denying him due process of law.

There is credible evidence that petitioner was wantonly beaten while confined at the Presidio in San Francisco. However, such treatment forms no part of the Court's consideration of this petition.

The petitioner may have his relief as prayed, upon preparation of findings of fact and conclusions of law.

It is Ordered that the petition for writ of habeas corpus be, and the same hereby is, Granted.

Dated: June 18, 1954.

/s/ George B. Harris.
United States District Judge.

[Endorsed]: Filed June 18, 1954.

Appendix B

United States Court of Appeals for the Ninth Circuit

Lieutenant General W. G. Wyman, Commanding Officer of the Sixth Army, Presidio of San Francisco, California, *Appellant,* vs. Russell Louis LaRose, *Appellee.*	No. 14,517 Jun. 16, 1955

Appeal from the United States District Court for the Northern District of California, Southern Division.

Before MATHEWS and CHAMBERS, Circuit Judges, and BYRNE, District Judge.

MATHEWS, Circuit Judge.

Appellee, Russell Louis LaRose, a male citizen of the United States, was born on October 27, 1932 attained the age of 18 years on October 27, 1950, and was, on November 6, 1950, a resident of Milwaukee County, Wisconsin. On November 6, 1950, he registered with a local board of the Selective Service System namely Local Board No. 48 of Milwaukee